Supreme Court, U.S.
FILED
NOV 8 2001
CLERK

(37)

Nos. 00-1751, 00-1777, 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CHILDREN FIRST AMERICA, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does Ohio's Pilot Project Scholarship Program, which provides eligible Cleveland parents with tuition scholarships they may use at the participating religious or secular school of their choice, have the primary effect of advancing or endorsing religion, in violation of the Establishment Clause?

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae Children First America and its local and regional affiliates are non-profit organizations whose primary mission is to promote school choice for low-income families through privately-funded tuition scholarships.[2] Over the past ten years, Children First America, the many partner organizations for which it serves as an

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. See S. Ct. Rule 37.6.

[2] In addition to Children First America, which is headquartered in Bentonville, AR, amici include the following affiliate organizations: A Brighter Choice Scholarships (Albany, NY); Alliance for Choice in Education (Denver, CO); Arizona Scholarship Fund; Arizona School Choice Trust; Children First Central Florida; Children First Columbus, OH; Children First Delaware County, PA; Children First Kansas; Children First Utah; Children First Virginia; Children's Educational Opportunities Horizon, (San Antonio, TX); Children's Educational Opportunities, (Austin, TX); Children's Educational Opportunities, (Oakland, CA); Children's Scholarship Fund Arkansas; Children's Scholarship Fund Baltimore, MD; Children's Scholarship Fund Chattanooga, TN; Children's Scholarship Fund Kansas City, MO; Children's Scholarship Fund Maine; Children's Scholarship Fund Portland, OR; DC Parents for School Choice, (Washington DC); Educate New Mexico; Education Freedom Fund, (Grand Rapids, MI); Educational CHOICE Charitable Trust (Indianapolis, IN); Helping Educate Responsible, Outstanding, and Enlightened Students, (Jacksonville, FL); Kids First Scholarship Fund (Minneapolis, MN); Memphis Opportunities Scholarship Trust, (Memphis, TN); Parents Advancing Choice in Education (Dayton, OH); Parents Challenge (Colorado Springs, CO); Partners Advancing Choice in Education (Columbia, SC); Scholarship Fund for Inner City Children (Newark, NJ); School CHOICE Scholarships (Louisville, KY); Star Sponsorship Program (Ft. Worth, TX); The Guardsman (San Francisco, CA); Washington Scholarship Fund (Washington, DC).

"umbrella," and other private-scholarship organizations have raised over $500 million and provided scholarships to more than 100,000 children. This year alone, more than 60,000 low-income children will benefit from a private tuition scholarship. Yet despite these successes, the demand from low-income parents seeking help in affording non-public schooling vastly outstrips the private funding available through amici and kindred organizations. For example, when the Children's Scholarship Fund offered 40,000 means-tested scholarships nationwide in 1999, over 1.25 *million* families applied or inquired. There is no realistic prospect that private charitable giving will generate the billions of dollars that would be needed to provide tuition grants on that scale. Consequently, Children First America's ultimate goal – giving every needy family an affordable choice between public and non-public schooling – cannot be realized solely through private philanthropy. In recognition of that fact, Children First America and its affiliates also work with school-choice advocates and legislatures nationwide to develop publicly-funded programs that provide direct financial aid to low-income parents to enhance their educational choices. Amici thus have a vital interest in the core constitutional issue in this case: whether the Establishment Clause forbids a neutral, evenhanded public tuition-grant program designed to benefit low-income children in a city whose public schools have a track record of failure.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

The movement for school choice in the United States rests on these propositions: (1) every child, regardless of family income, should have access to an adequate elementary and secondary education; (2) public schools are

failing to provide a decent education to millions of children, especially children from low-income families who cannot afford private schooling; (3) as a matter of basic fairness these children and their families should be given the means to opt out of their failing public schools; (4) empowering poor families will also improve public schools by forcing them to compete with private schools for low-income students (as well as more affluent ones); and (5) the best way to foster these objectives is to give low-income parents educational "financial aid" that goes where their child goes, so that they can choose *among* private schools, as well as *between* public and private schooling. Virtually no one disputes the first two of these propositions, and the others are supported by a growing body of empirical research attesting to the benefits of increased school choice for both students who choose to exit the public system and students who choose to stay in it. *See* Affidavit of Paul E. Peterson, J.A. at 104a-117a.

While research can continue indefinitely, the window of opportunity for educating each year's cohort of children is all too short. Proponents of school choice have accordingly mobilized on two fronts: they have turned to private philanthropy to raise funds for private scholarships for low-income families, and they have sought to persuade voters and democratically elected legislatures to enact direct financial-aid programs for education. The considerable achievements of private-scholarship organizations are briefly described in our Statement of Interest. On the public financial-aid side, legislation providing means-tested scholarships to limited numbers of students in failing urban school districts has been adopted by Wisconsin (for Milwaukee) and Ohio (for Cleveland). An Establishment Clause challenge to Wisconsin's program was rejected by the Wisconsin Supreme Court in *Jackson v.*

Benson, 578 N.W.2d 602. Ohio's initiative – the Pilot Project Scholarship Program – is the subject of the Establishment Clause challenge in the present case.[3]

Ohio's General Assembly adopted the Scholarship Program in 1995, in an attempt to improve educational opportunities for low-income children in the fiscally and educationally troubled Cleveland City School District ("CCSD"). The Program provides scholarships to children residing within the CCSD for kindergarten through eighth grade, with preference given to students from "low-income families," defined as families whose income is below 200% of the poverty level. Ohio Revised Code ("R.C.") 3313.978(A). The vast majority of children receiving scholarships are from low-income families; indeed, 60% are from families whose income is at or below the poverty level. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999). The Program limits the tuition participating schools may charge low-income families to $2,500, and pays 90% of the school's actual tuition. R.C. 3313.976(A)(8); 3313.978(A). Hence the maximum scholarship amount is $2,250. Families whose income is above the "low-income" ceiling receive a lower tuition subsidy of $1,[illegible] or 75% of the school's tuition, whichever is less. *Id.* [illegible]dition, using the same eligibility criteria, the Prog[illegible]m provides an equal number of tutoring scholarships up to $500 to be used by families who elect to send their children to Cleveland public schools. R.C. 3313.978(B).

The Scholarship Program permits any private school, religious or secular, to participate if it is located in Cleveland and meets the state's minimum educational standards. R.C. 3313.976(A)(1),(3). It also permits *public* schools in districts adjoining Cleveland to participate, R.C. 3313.976(C) – and encourages their participation by

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[3] In a separate proceeding, the Ohio Supreme Court rejected respondents' Establishment Clause challenge to the Program. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

offering them the $2,500 voucher amount in addition to Ohio's base per capita aid of more than $4,000 per pupil. R.C. 1314.03(I)(1); R.C. 3313.979(B). Participating schools must give preference in admissions to low-income students, and are forbidden to discriminate on the basis of race, ethnicity, or religion. R.C. 3313.976(A)(4). Scholarships are payable to the parents of the eligible student, and may be used at whichever participating school the parents choose. R.C. 3313.979. After parents choose schools for their children, scholarship checks are mailed to the schools to be endorsed over by the parents. 72 F. Supp. 2d at 836.

Notwithstanding the failure of any adjoining public schools to enter the program, as of the 1998 school year 22% of participating students were enrolled in a non-religious school. By the time of the District Court's 1999 decision striking down the Program on summary judgment, however, there was a sharp decline in this statistic: only 4% of the 3,761 students in the Program were enrolled in one of the 10 secular schools then participating in the Program. An important reason for this decline was that Ohio's new Community School program – which provides independent public charter schools with the same $4,500-plus per student that Ohio contributes to other public schools in Cleveland – had begun to impact the mix of schools in the Program. Affidavit of Steven M. Puckett ¶14, J.A. 163a; Affidavit of Caroline M. Hoxby ¶¶4c, 5c-5d, J.A. 56, 60. Faced with a choice between continuing to operate as private schools eligible to receive Scholarship Program aid of $2,250, or reconstituting themselves as Community Schools and doubling their revenue, the Hope Academies – which had educated almost 15% of all the students in the Program – took the latter course. Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* ("Greene Study"), J.A. 206a, 209a.

The District Court ruled, and the Sixth Circuit affirmed, that the Scholarship Program has the impermissible effects of advancing and endorsing religion. 72

F. Supp. 2d 834 (1999); 234 F.3d 945 (2000). These conclusions rested largely on the facts that all of the schools then participating in the Program were private, that 82% of the 56 participating schools were religious, that 96% of the students then participating in the Program were enrolled in a religious school, and that the Program does not require that participating schools use the tuition grants exclusively for secular purposes. 234 F.3d at 949. In treating those facts as determinative, the Court of Appeals held that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) was controlling, rather than its subsequent decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986). *See* 234 F.3d at 958-961. The Court of Appeals refused to consider the impact of the Community Schools program on the Program's school-participation and enrollment statistics, reasoning that evidence "concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant," and "would expand our jurisdiction far beyond the case at hand." *Id.* at 958. It also concluded that the refusal of adjoining public schools to participate should be blamed on "the program's design," because the $2,250 maximum tuition grant creates "a financial disincentive for public schools outside the district to take on students via the school voucher program." *Id.* at 959. Judge Ryan dissented. 234 F.3d at 963.

Amici's view of the Scholarship Program's "effects" is very different from the narrow, formalistic evaluation on which the Sixth Circuit's judgment rests. Our perspective is informed by our experience raising millions of dollars from thousands of donors to provide tens of thousands of private scholarships to low-income families. We submit that the decision below reflects a tragic misunderstanding of the intent, design, function, and effect of programs – public or private – that offer low-income parents the financial wherewithal to opt out of local public schools and to choose among a broad range of alternative schools. A brief description of our experience

will set the stage for our legal arguments and, we believe, assist the Court in characterizing the Scholarship Program for Establishment Clause purposes.

Our donors are people from all walks of life and of diverse religious beliefs. A large percentage of them are successful businesspersons who have seen firsthand the deficiencies of public education in job applicants and employees. These men and women donate generously because they think greater educational opportunity for low-income children is a moral imperative, and because they think enabling low-income parents to afford private schools will both improve their children's education and give public schools better incentives to function effectively. They do not give in order to advance or endorse religion or religious education. Quite the contrary. Our donors know that their dollars may be given to parents of an entirely different religious persuasion than their own, and that those dollars may end up in the coffers of a religious (or secular) school with whose professed beliefs they profoundly disagree. That risk is inherent in the idea of parental school choice as we conceive it: our private-scholarship programs are designed to give parents freedom to choose among whatever local private schools their scholarships enable them to afford.

It would come as a great surprise to amici and our donors, therefore, to learn that in reality our private-scholarship programs have the "primary effect" of advancing and endorsing religion, merely because, in the numerous urban areas in which we operate, (1) the *current* majority of private schools are religious schools, and (2) the vast majority of low-income parents who receive scholarships *elect* to enroll their children in religious schools. These are givens, facts of educational life for which we are not responsible, and which we have no choice but to accept in order to expand school choice for low-income families here and now. Were we to restrict our scholarships to use at private secular schools, some of the low-income families who now seek our help would

shun it, and many of those who still sought our help would have a scholarship but no place to spend it.

Unlike Ohio's General Assembly, of course, amici are not bound by the strictures of the Establishment Clause. The fact remains, however, that the basic character of Ohio's Scholarship Program is functionally equivalent to the private programs we operate. In the world of education reform, the intent and effect of the Scholarship Program and its philanthropic counterparts are to advance and endorse enhanced educational opportunity for low-income children, not to advance or endorse religion. As we shall explain, this Court's Establishment Clause jurisprudence leads to the same conclusion in the world of constitutional law.

SUMMARY OF ARGUMENT

The Scholarship Program satisfies the "primary effect" test as this Court explained it in *Agostini v. Felton*, 531 U.S. 203 (1997). The Program neither "results in governmental indoctrination" nor "defines its recipients by reference to religion," and Respondents do not contend that it creates "an excessive entanglement." *Id.* at 234.

Both the no-indoctrination and neutral-definition criteria are satisfied by "a true private-choice program," as Justice O'Connor used that phrase in her concurring opinion in *Mitchell v. Helms*, 530 U.S. 793, 842 (2000). By providing aid directly to its beneficiaries, a true private-choice program gives them control over whether the aid will be used for religious or secular education. *Id.* at 842. Consequently, the fact that some aid ultimately reaches religious schools and is used for religious purposes is attributable not to the government program, but to beneficiaries' private decisions. *Id.* For the same reason, reasonable observers will attribute any endorsement of religion to individuals, not the government. Thus, provided that it is also strictly neutral in defining its eligible recipients, and creates no financial incentive to choose

religious schools over secular ones, a true private-choice program complies with the *Agostini* criteria.

The Scholarship Program is a "true private-choice program." *First*, it makes scholarships available to Cleveland families regardless of their religious affilation, and the scholarship amounts do not vary depending on whether the school is religious or secular. *Second*, the Program gives parents full control over whether to apply for a scholarship, and at which participating school – religious or non-religious – they will use it. *Third*, no matter which school-choice comparison parents make between the Program and their various secular options, their financial incentives are *never* to choose religious education. *Fourth*, the Program, together with other provisions of Ohio law, was also designed to (and does) give parents a wide range of *secular* alternatives to Cleveland public schools, including Community Schools, participating secular private schools, and – if only they would elect to participate – suburban public schools.

The Sixth Circuit erroneously concluded that the Program is not a true private-choice program, principally because it evaluated the Program in a vacuum, rather than as part of Ohio's overall scheme for school choice in Cleveland. The Court of Appeals focused on the facts that, in 1999, 82% of the participating schools were religious, and 96% of students receiving scholarships were enrolled in a religious school. It attributed these outcomes entirely to the Program's design, and either ignored or dismissed as "irrelevant" the other factors that, in combination, more than suffice to produce these results. 234 F.3d at 958. *First*, the percentage of scholarship students enrolled in secular private schools dropped sharply due to the expansion of the Community Schools program, whose comparatively generous aid levels induced some participating schools to leave the Scholarship Program and become Community Schools. *Second*, the refusal of suburban public schools to participate – despite Ohio's offer of more than $4,000 in state aid per student *plus* the $2,250 scholarship amount – has to date

eliminated an important non-religious option the General Assembly contemplated when it created the Program. *Third*, the ongoing litigation over the Program has discouraged new secular private schools from emerging, because of the continuing threat that their low-income students' tuition grants will be terminated on Establishment Clause grounds. *Fourth*, in light of the fact that roughly 85% of private-school students nationwide attend religious schools, it is entirely unsurprising that the vast majority of students in the Program are likewise enrolled – *at the election of their parents* – in religious schools. The pattern of outcomes under the Program, in short, reveals no grounds whatsoever for doubting either the neutrality of the Program's design, or the genuinely independent character of the aid-directing decisions of participating parents.

The Court of Appeals also relied heavily on the "*Nyquist* rules" it extracted from this Court's decision in *Nyquist*. 234 F.3d at 958. But the first of these rules – that a program impermissibly advances religion if most of its individual beneficiaries attend religious schools – is nowhere to be found in *Nyquist*, and has since been decisively rejected by this Court. *See, e.g., Agostini*, 521 U.S. at 229. The second rule – that even an aid program that provides aid directly to individual beneficiaries will be deemed to advance religion if the aid can be put to religious use – is implicit in *Nyquist*. But *Witters* and *Agostini* leave no doubt that this rule does not apply to a program that is truly neutral and whose aid is directed by truly private choices. *Witters*, 474 U.S. at 489; *Agostini*, 521 U.S. at 225.

Finally, the Court of Appeals relied on a crabbed interpretation of *Nyquist*'s well-known footnote 38, which it treated as authorizing an "exception" for tuition-grant programs only if beneficiaries can direct the aid to the widest *possible* spectrum of public and private schools. This Court's subsequent decisions, however, require only that "a fairly wide spectrum of organizations is eligible to apply for and receive funding," *Bowen v. Kendrick*, 487

U.S. 589, 608 (1988), and that the program "make[s] aid available generally without regard to the religious or nonreligious character of the recipient school." *Mitchell*, 530 U.S. at 847 (O'Connor, J., concurring). The Scholarship Program plainly complies with these requirements.

ARGUMENT

I. A "true private-choice program" that neutrally provides aid to beneficiaries, who then make independent decisions directing that aid to religious or secular schools, does not have the "effect" of advancing or endorsing religion.

Because there is no contention that the Scholarship Program lacks a secular purpose, the constitutional spotlight in this case falls solely on the "primary effect" prong of the Establishment Clause test first advanced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequently reconfigured in *Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, the Court identified three "primary criteria" for determining whether a governmental aid program impermissibly advances or endorses religion: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Id.* at 234. Respondents do not contend that the Program creates an excessive entanglement, and hence we confine our discussion to the no-indoctrination and neutral-definition criteria.

Both these criteria are satisfied by what Justice O'Connor, concurring in the judgment in *Mitchell v. Helms*, 530 U.S. at 842, termed a "true private-choice program." The defining feature of a true private-choice program is that "the government provides aid directly to the student beneficiary," and consequently "that student can attend a religious school and yet retain control over

whether the secular government aid will be applied toward the religious education." *Id.* at 842. Under these circumstances, "[t]he fact that aid flows to the religious school and is used for the advancement of religion is . . . *wholly* dependent on the student's private decision." *Id.* (emphasis in original). In contrast to a "per-capita-aid" program, a true private-choice program is constitutional even if – as in *Witters* – it allows "actual diversion" of aid to religious uses in the hands of the school to which the recipient directs the aid. *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring).[4]

For three reasons, a "true private-choice program" also satisfies *Agostini*'s no-indoctrination requirement. First, if and when state aid ultimately reaches religious-school treasuries, it arrives there by virtue of "genuinely independent and private choices," *Witters*, 474 U.S at 487, rather than as an "effect" of the state's actions in operating the program. Second, a reasonable observer would not perceive a true private-choice program as government endorsement of religion. "When government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school," reasonable observers will attribute endorsement to those individuals, not the government. *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring). Finally, by definition a true private-choice

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[4] In *Mitchell*, the four Justices in the plurality argued that a neutral and non-discriminatory per-capita-aid program is also constitutional, even if it permits "actual diversion" of aid to religious use, provided that the aid itself is not religious in content. *Mitchell*, 530 U.S. at 820-825 (plurality opinion). Because the position taken by Justice O'Connor (and Justice Breyer, who joined her opinion concurring in the judgment) constitutes "the narrowest grounds" for the result in *Mitchell*, we treat her opinion as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977).

program does not involve the heightened Establishment Clause concerns that arise "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995).

Of course, a true-private choice program must also be strictly neutral, as required by *Agostini*'s second criterion. It must define its eligible recipients without reference to – or preference for – religion, to avoid skewing the distribution of aid in ways that "assist[ ] the educational function of religious schools." *Agostini*, 521 U.S. at 225. And it must ensure that the level of aid individuals receive does not increase if they choose religious over secular education, thereby guaranteeing that there is no financial incentive for recipients to funnel state aid to religious schools. *Id.* at 230-231. When these requirements are satisfied, there is every assurance that recipients' individual choices are indeed "genuinely independent."

In sum (provided the secular-intent and no-entanglement rules are also satisfied, as they are here) an educational aid program does not violate the Establishment Clause if it is a "true private-choice program," that is, if it (1) supplies individual recipients with aid they may freely choose to spend on religious or non-religious schooling, and (2) does so pursuant to neutral eligibility and aid provisions. The question in this case, therefore, boils down to whether the Scholarship Program – a facially neutral aid program in which tuition scholarships are given to individual parents to use at whatever participating school the parents choose – is in fact a true private-choice program.

II. The Scholarship Program qualifies as a "true private-choice program."

The Scholarship Program qualifies as a "true private-choice program": (1) its eligibility and aid criteria are

neutral; (2) it gives participating parents full control over whether to direct their children's scholarships to a religious or secular school; (3) it creates no financial incentive for parents to choose religious over secular schooling; and (4) in tandem with other provisions of Ohio law, it makes available to low-income Cleveland parents a wide range of alternative choices – public and private, religious and non-religious – to the default option of sending their children to a CCSD public school.

First, the program's criteria are neutral. Families who meet the Program's residency requirements are eligible regardless of their religious affiliation (if any). Scholarship recipients may use their tuition aid at any participating school, religious or secular. The scholarship amount is based on the family's income and the statutory maximum (or the school's tuition, if lower), and does not vary depending on whether the school is religious or secular. *See* R.C. 3313.978(A).

Second, the program gives parents full control over whether or not to send their children to a participating school, and if so whether to choose a religious or secular school. No family is required to participate in the Scholarship Program. If parents are unhappy with the range of choices represented by participating schools, they are free to withdraw from the Program and enroll their child in a Cleveland public school. *See* R.C. 3313.977(C). The Program also authorizes parents to enroll their child in a participating suburban public school – although, regrettably, no suburban public schools have yet seen fit to participate. R.C. 3313.978(A)(1). In addition, pursuant to Ohio's Community Schools program, Cleveland parents also have the option to pursue admission at public charter schools that operate independently of the CCSD. R.C. 3314.06.

Third, the program does not create an incentive for parents to choose a religious school rather than a secular

public or private school. There are four relevant comparisons, and in none of them is such an incentive present. First, the scholarship merely reduces – but does not eliminate – the *disincentive* parents confront when they consider rejecting a free education at a Cleveland public school in favor of enrollment in a tuition-charging religious school. Even parents who receive the maximum scholarship must still contribute 10% of the religious school's tuition in cash or in services. *See* R.C. 3313.976(A)(8). Second, for parents choosing between a participating religious school and a participating secular school, the same maximum scholarship amounts are available under either option. Third, parents can avoid the Program's residual tuition costs by choosing a Community School rather than a religious school participating in the Program. Fourth, if suburban public schools participate in the future, parents can also escape the Program's residual tuition costs by electing this public-school option. In no circumstance, therefore, does the Program create a financial incentive for parents to choose religious education for their children.

Fourth, the Scholarship Program, in tandem with other provisions of Ohio law, makes available to Cleveland parents a wide range of alternatives to the *status quo* of sending their children to Cleveland's struggling public schools. Over time, the *mix* of alternatives has shifted, especially in response to the subsequent enactment of the Community Schools program. But the Scholarship Program has *never* functioned to give parents an either-or choice between Cleveland public schools and participating religious schools. Today, parents have the additional options of choosing a participating secular school, or choosing a Community School that, while nominally public, operates independently of CCSD. R.C. 3314.01(B). In the future, if this Court upholds the Scholarship Program, more secular private schools may emerge, and some

adjoining public schools may at long last step forward to participate.[5] This robust set of options amply suffices to show that under the Scholarship Program, "tuition grants" are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Agostini*, 521 U.S. at 225 (quoting *Witters*, 474 U.S. at 487).

III. The Sixth Circuit erroneously concluded that the Program is *not* a "true private-choice program" because it failed to consider how the Program actually functions as part of Ohio's overall scheme for school choice in Cleveland.

The Court of Appeals concluded that the Scholarship Program is *not* a true private-choice program, but rather a non-neutral plan that channels aid to religious schools by discouraging private secular schools from participating, and by giving participating parents little choice but to select a religious school. *See* 234 F.3d at 959-961. The Court of Appeals also identified several reasons why the Program is supposedly unconstitutional under this Court's decision in *Nyquist*. As we explain in section IV below, the rules the Sixth Circuit derived from *Nyquist* are inconsistent with this Court's later decisions. In large part, however, the Court of Appeals' grounds for denying the Program "true private-choice" status were *not* based on *Nyquist* or this Court's other decisions interpreting and applying the "effects" test. Rather, they derive from

[5] In Milwaukee, the number of secular schools participating in its scholarship program has increased from seven in 1990 to 30 in 1999, and 3,025 out of 8,066 students enrolled in the program attend one of these nonreligious schools. Declaration of Dr. Howard Fuller, ¶¶ 18 and 21, J.A. at 235-36.

the Court of Appeals' idiosyncratic insistence on evaluating the Program in isolation, rather than in its full legal and operational context. In this section, we show that a proper application of the "effects" test leads to a very different – and entirely benign – characterization of the Program's design and effects.

1. The low rate of participation in the Program by secular schools, and the low percentage of participating children enrolled in secular schools, are attributable to factors unrelated to the Program's design.

The Sixth Circuit attached great weight to the facts that, in 1999, 82% of the schools participating in the Program were religiously-affiliated, and that 96% of the children participating in the Program were enrolled in one of these schools. Petitioners argued that these statistics were misleading, because factors other than the Program's design explained the relatively small – and declining – market-share of secular schools within the Program. The Court of Appeals, refusing to consider this evidence, insisted that these results are attributable to the Program's design. *See* 234 F.3d at 961.

This narrow and selective focus misunderstands the "effects" prong of Establishment Clause analysis. In order to determine which consequences of a law can properly be deemed "effects" of that law, it is necessary to consider whether other causes are primarily responsible for those consequences. For example, imagine that fraud or mismanagement had caused some of the larger secular private schools that initially participated in the Program to go out of business. It would be absurd to argue that the relevant consequence – a shrinking role for secular private schools within the Program – should be viewed as an "effect" of the Program rather than of misfeasance by the operators of these schools. Yet the Court of Appeals

refused to consider whether causes other than the design of the Program are in fact responsible for the Program's high ratio of religious to nonreligious schools, and its high ratio of enrollment in religious schools to enrollment in secular ones. *See* 234 F.3d at 958.

The operation of the Scholarship Program takes on a very different complexion once these blinders are removed. The decline in the secular-school segment of the Program is attributable to factors quite apart from the Scholarship Program. First and foremost, the legislature's subsequent creation of the Community Schools program – in which independent charter schools receive roughly twice as much aid per student as their counterparts in the Scholarship Program – predictably led the two largest participating secular schools (the Hope Schools) to reconstitute themselves as Community Schools. *See* Greene Study, J.A. at 209a, 218a; Affidavit of Caroline M. Hoxby, ¶¶5c-5d, J.A. 60a. Because the Hope Schools had educated nearly 15% of all Program students, their removal from the Program had "a profound effect" on its religious composition. Greene Study, J.A. at 209a.

The unwillingness of adjoining public school districts to participate in the Program has also reduced the percentage of students in the Program who are enrolled in non-religious schools. That unwillingness, however, cannot possibly be traced to any supposed inadequacy of the scholarship amounts. Were a suburban public school to participate in the Program, it would receive *both* the full scholarship amount *and* Ohio's base per capita aid of approximately $4,500 for Cuyahoga County, R.C. 3317.012(B), for a total of over $6,500 per student. This level of state aid may fall slightly below the *average* per capita cost of education in some of the adjoining districts. But the *marginal* cost of another student is likely to be far lower than the average cost. Remarkably, however, the Sixth Circuit – ignoring the additional $4,000-plus per

student suburban public schools would receive were they to participate – concluded that "[a]t a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." 234 F.3d at 959. Whatever reasons actually underlie the unanimous refusal of adjoining public schools to participate in the Program, "a financial disincentive" is not among them. The Scholarship Program offers these schools a generous level of funding to participate, and hence their failure to participate should be treated as an independent decision, not as an "effect" of the Program itself. It would be a sad irony if the refusal of suburban public schools to help educate low-income Cleveland children were held to establish a constitutional barrier for private schools that *do* choose to help.[6]

2. When the Program is viewed in tandem with the Community Schools initiative, the proportion of school-choice students enrolled in secular schools increases dramatically.

In addition to helping explain the decline in secular-school participation in the Program, the Community Schools program is also relevant because it too is a state-subsidized school-choice program in which Cleveland families are eligible to participate. When the two programs are considered together, a very different picture of

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[6] Participation by secular schools has also been reduced by a third factor not attributable to the Program: the uncertainty created by the litigation that has dogged the Program from its inception. The $2,250 scholarship amount might well induce the creation of new secular private schools, if those schools could be confident that tuition aid would be available to their students in the future. Few educational entrepreneurs, however, would dare start a school to educate low-income children whose tuition grants could be terminated at any time by an adverse constitutional ruling.

parental decisions emerges than the one painted by the Sixth Circuit. In the 1999 school year, 3,637 students in the Scholarship Program attended religious schools, 128 students in the Scholarship Program attended secular private schools, and 2,087 students attended secular Community Schools. Greene Study, J.A. at 222a. Overall, then, more than 37% of Cleveland students who used direct or indirect state educational aid to opt out of CCSD public schools chose non-religious schools.

The Court of Appeals dismissed these facts as "irrelevant" because the Scholarship Program and the Community Schools program are separate programs, adopted at different times, and codified in different chapters of the Ohio Code. 234 F.3d at 958. But it identified nothing in this Court's Establishment Clause cases (including *Nyquist*) that requires this bizarre result. On the Sixth Circuit's reasoning, the full facts about school-choice student enrollment in non-CCSD schools *would* be relevant – and the Program might well be constitutional even in the Sixth Circuit's eyes – if Ohio's General Assembly simply re-enacted the two Programs together and codified them in the same chapter of the Code. The constitutionality of the Scholarship Program should not turn on these empty formalities. Rather, the Program's constitutionality should be evaluated in light of its design and operation as part of, and in interaction with, other elements of Ohio education law, including the Community Schools program.

3. The Scholarship Program's tuition ceiling and eligibility requirements for participating schools do not skew the range of school choices available to Cleveland parents.

The Sixth Circuit condemned the Scholarship Program as "not neutral" in two respects. First, it concluded that the Program skews the mix of participating schools

because "[s]tudents may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program." 234 F.3d at 959-960. Second, it asserted that "the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959.

Neither objection is persuasive. As for eligibility requirements, the non-inclusion of Community and magnet schools is a red herring: students do not *need* a voucher to choose a Community School, because those schools receive per capita funding from Ohio in lieu of the smaller voucher payments. Moreover, while it is true that the Program is limited to registered private schools located within Cleveland, the Court of Appeals identified no evidence – indeed, it did not even assert – that this geographical restriction has *any* effect on the ratio of secular private schools to religious ones within the Program. A tuition-grant program whose geographical restrictions were "gerrymandered" to exclude areas with high concentrations of private secular schools would lack the neutrality required of a true private-choice program. But the selection of the entire city of Cleveland as the territory within which private schools may participate can hardly be presumed to constitute gerrymandering.

As for "tuition restrictions," the Court of Appeals identified no barriers or impediments created by the Scholarship Program to entry of private secular schools. Religious schools may on average pay their teachers less, but nothing prevents secular private schools from recruiting teachers who are willing to work for less because they

are committed to the secular mission of giving low-income children a high-quality education. And while some religious congregations may subsidize their religious schools, amici can attest that it is eminently possible to raise large sums of money *on a non-sectarian basis* to provide low-income children with better educational opportunities. Nothing in the Scholarship Program prevents private secular schools from fund-raising to cover costs in excess of the Program's $2,500 tuition ceiling. In short, the Court of Appeals failed to identify anything in Ohio law – rather than in the private altruism of religious communities and teachers at religious schools – that would tend to discourage secular private schools from competing with them for Scholarship Program students.

Beyond that, the Court of Appeals provided no reason to think that the Program's scholarship amounts are set at a level designed to discourage all but religious schools from participating. From the inception of the Scholarship Program, there have always been a significant number of participating secular schools. Indeed, the fact that 22% of participating students attended private secular schools in 1998 actually cuts in favor of the Program when one recalls that only about 15% of private school students in the United States attend non-religious schools. Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *School Choice and Social Controversy: Politics, Policy, and Law* 25 (Sugarman and Kemerer eds. 1999). The vast majority of parents who are able to afford private-school tuition elect to send their children to religious schools. There is no reason to suspect that parents who cannot afford private-school tuition differ in this respect from those who can. One would therefore expect that *in an entirely neutral tuition-grant program*, the overwhelming majority of participating low-income parents would choose a religious school rather than a private secular one. Parental preferences alone

could well explain *all* of the statistical disproportion between Program enrollment in religious and private secular schools on which the Court of Appeals fastened.

The Court of Appeals, however, appears to have believed that only government-directed advancement of religion, and not genuinely independent and private choices, could possibly account for the fact that 96% of the children participating in the Program in 1999 attended religious schools. Even putting aside the other causes that helped yield this statistic (such as the impact of well-funded Community Schools), the inference is baseless. Everyday experience confirms that many parents, rich and poor alike, choose to send their children to religious schools because their faith is precious to them and they want to pass it on to their children. In addition, however, many parents who participate in the Scholarship Program choose religious schools primarily for reasons other than religion, such as academic quality, greater safety, and location. *See* Affidavit of Paul E. Peterson, J.A. 119a (describing reasons why Cleveland parents say they apply for scholarships). Indeed, many parents choose religious schools *despite*, not because of, the particular religious faith those schools espouse. For example, at some of the participating Roman Catholic schools an overwhelming majority of the students belong to other faiths.[7] Affidavit of Carolyn Jurkowitz, ¶4, Sixth Cir. J.A. at 02743. In pragmatically choosing a high-quality education for their children at a school that professes a faith

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[7] This phenomenon is not peculiar to the Scholarship Program. Many non-Catholic recipients of amici's private scholarships send their children to Catholic schools, even though our scholarships typically cover only about half of tuition costs.

different from their own, these parents are making "genuinely independent" decisions they believe to be in their children's *secular* best interests.

The Court of Appeals was thus quite wrong to hold that this case involves "government limitation of the available choices to overwhelmingly sectarian private schools," and that therefore "[t]he idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate" here. 234 F.3d at 960. The Scholarship Program contains no such "government limitation," and the rationale for treating genuinely independent private choices as "a determining factor" applies with full force.

IV. The *"Nyquist* rules" the Sixth Circuit distilled from *Nyquist* are inconsistent with this Court's subsequent decisions, but the Court need not overrule *Nyquist* to sustain the constitutionality of the Scholarship Program.

The Sixth Circuit erroneously concluded that this Court's decision in *Nyquist* requires invalidation of the Scholarship Program. If indeed *Nyquist*'s evaluation of New York's tuition grant program requires the conclusion that Ohio's Scholarship Program is unconstitutional, then we submit that *Nyquist* conflicts with this Court's subsequent decisions affirming that true private-choice programs do not violate the Establishment Clause. As we have shown, the Program qualifies for "true private-choice" status because it meets the rigorous standards set out in the plurality and concurring opinions in *Mitchell*: its eligibility requirements and benefit levels are strictly neutral with regard to religion; it permits recipients to make independent choices about where to direct the aid they receive; it does not create incentives to prefer religious over secular schools; and it is not designed to induce participation by religious schools or discourage

participation by secular ones. *See* 530 U.S. at 809-814 (plurality opinion); *id.* at 841-843 (opinion concurring in the judgment). Because these demanding requirements are satisfied, so is the "effects" test: the ultimate disposition of the aid is properly attributable to the private choices of aid recipients, not to state action, and reasonable observers would not perceive the Program as endorsing religious education. Consequently, as a true private-choice program, the Scholarship Program is constitutional even though most of its aid recipients spend their financial aid at religious schools, and even though these schools may put that aid to religious use.

It is far from clear, however, that there is a true conflict between these principles and *Nyquist*. Certainly the *judgment* in *Nyquist* can readily be reconciled with them. Although the Court found that the New York aid programs had legitimate secular purposes, there was ample evidence from which to infer that some aspects of the program were not truly neutral, and that even the neutral tuition grants were also motivated by an impermissible purpose – to "channel[ ] state aid to sectarian schools." 413 U.S. at 785. Indeed, *Nyquist*'s discussion of the effects of the tuition grants suggests the Court *did* draw that inference. *See id.* at 783 ("it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian.") At a minimum, then, *Nyquist* may have continued vitality as a reminder that even a facially neutral program that provides tuition grants to individual parents will offend the Establishment Clause if its history, structure and design give rise to a reasonable inference that the program's "function" is to advance or endorse religion.

In addition, however, we believe the Court can uphold the constitutionality of the Scholarship Program without rejecting in its entirety *Nyquist*'s analysis of New

York's tuition-grant program. The Court of Appeals identified three reasons why the Scholarship Program is unconstitutional under *Nyquist*'s tuition-grant analysis. On close examination, it can be demonstrated that the implicit legal rules the Court of Appeals found in *Nyquist* have already been *explicitly* rejected by this Court in later cases. All that is necessary to sustain the constitutionality of the Scholarship Program, then, is to recognize that the Court has already departed from *Nyquist*'s approach (or at least from the Court of Appeals' interpretation of *Nyquist*) on these specific issues. In the end, it is primarily the Sixth Circuit's "*Nyquist* rules," 234 F.3d at 959, not *Nyquist* itself, that stands in need of correction by this Court.

The first reason identified by the Court of Appeals was that, as in *Nyquist*, although the Program's tuition scholarships are paid to parents, "the great majority of schools benefited by these tuition dollars are sectarian." 234 F.3d at 958. But this factual similarity is not a rule of law; and even if it were, that rule would no longer be good law. In *Agostini*, the Court explicitly refused to "conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Agostini*, 521 U.S. at 229. *See also Mueller*, 463 U.S. at 401 (rejecting "a rule grounding the constitutionality of a facially neutral law on . . . the extent to which various classes of private citizens claimed benefits under the law").

Second, the Court of Appeals reasoned that, again as in *Nyquist*, "there are no restrictions on the religious schools as to their use of the tuition funds," and hence no guarantee that the aid will be used exclusively for secular purposes. *Id.* at 959. On this point, the Sixth Circuit's interpretation of *Nyquist* is clearly correct: *Nyquist* treated New York's tuition grants as fatally flawed because they were subject to no restrictions that would " 'guarantee

the separation between secular and religious educational functions and . . . ensure the State financial aid supports only the former.' " *Nyquist*, 413 U.S. at 783 (quoting *Lemon*, 403 U.S. at 613). That reasoning, however, is no longer good law as applied to educational aid programs in which money goes to religious institutions only by virtue of genuinely independent individual choices. As the Court held in *Witters*, the Establishment Clause prohibition on "aid to a religious institution unrestricted in its potential uses, *if properly attributable to the State*," simply does not apply when "the decision to support religious education is made by the individual, not the State." 474 U.S. at 489, 488 (emphasis added). In other words, true private-choice programs constitute the core cases in which the Court has "departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225.

Third, the Court of Appeals held that the Program does not come within what it termed "the exception to the *Nyquist* rules" recognized in footnote 38 of *Nyquist*,[8] because "state assistance is only available to those students who attend private schools – the aid is clearly dependent on whether parents choose public or private schools." 234 F.3d at 959. This mischaracterization of the Program overlooks the facts that adjoining public school districts are eligible to participate in the Scholarship Program, that low-income children in the Cleveland public

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[8] See 413 U.S. at 782, n. 38 (reserving the question "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.")

schools are eligible for tutoring grants under the Program, and that Cleveland parents may also seek to enroll their children in public Community Schools. Nor is it the case that all private schools are eligible to participate in the Program: only private schools located in Cleveland may participate, and then only if they register as part of the Program. *See* 234 F.3d at 959-960.

The Court of Appeals also interpreted the *Nyquist* "exception" more narrowly than this Court's later cases indicate is proper. Quoting language from *Nyquist*'s footnote 38, the Court held in *Witters*, and reaffirmed in *Agostini*, that the Establishment Clause does not bar "government aid that directly assists the educational function of religious schools" when " tuition grants" are " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Agostini*, at 225 (quoting *Witters*, 474 U.S. at 487). The Court of Appeals appears to have believed that this language encompasses only programs (such as the G.I. Bill) that make aid available *universally* to all schools, public and private. But the rationale underlying this language, as this Court explained in *Mueller*, is that " 'the provision of benefits to so broad a spectrum of groups is an important index of secular effect.' " 463 U.S. at 397 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The Scholarship Program and its companion Community Schools program "make available" several varieties of educational aid to low-income Cleveland families, and their *private* choices determine which among a "broad spectrum" of alternative schools will indirectly benefit. As in *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988), "a fairly wide spectrum of organizations is eligible to apply for and receive funding" under Ohio's programs for school choice in Cleveland. Under these circumstances, the crucial question should not be whether the Program includes more private schools than public ones,

but whether it falls within the class of "neutral government programs that make aid available generally *without regard to the religious or nonreligious character of the recipient school*," and of which the Court has accordingly "taken a more forgiving view." *Mitchell*, at 847 (O'Connor, J., concurring) (emphasis added).[9] Under that standard, focusing as it does on whether the Program in any way discriminates in favor of religious schools or against secular ones, the Program is undeniably constitutional.

CONCLUSION

According to the Court of Appeals, the low incidence of scholarship student enrollment in non-religious schools, and the low level of participation by non-religious schools in the Scholarship Program, is not the result of "truly 'private choice[s]' " because "the available choices *resulting from the program design* are predominantly religious." 234 F.3d at 961 (emphasis added). As we have shown, however, this pattern of outcomes is in fact attributable not to "the program design" but to the more generous funding received by Community Schools, to the unwillingness of adjoining public schools to participate, to uncertainty over the outcome of this litigation – and above all to the independent choices parents make as they pursue the educational best interests of their children.

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[9] Nor should it be necessary that a neutral aid program benefit public schools, provided it benefits a wide range of private ones – and provided that the reason for the exclusion of public schools is that they are already benefiting from comparable or greater state subsidies. For example, the Washington program of educational aid to the blind upheld in *Witters* surely would not become unconstitutional if Washington were to create a system of free public colleges.

In considering the relevance of these parental choices, it is well to bear in mind this Court's recent decision in *Troxel v. Granville*, which reaffirmed the "fundamental right of parents to make decisions" concerning the upbringing and education of their children, as well as "the traditional presumption that a fit parent will act in the best interest of his or her child." 530 U.S. 57, 66, 69 (2000) (plurality opinion). Consistent with that presumption, amici suggest that – provided they are financially empowered to do so – fit parents will presumably make autonomous educational choices based on their private values and their intimate knowledge of their children. Nothing in the design or operation of Ohio's facially neutral Scholarship Program, which seeks to give low-income Cleveland parents the financial ability to make these independent private choices, indicates that it functions to skew parental decisions, to channel financial aid to religious schools, or to send a message of governmental endorsement of religion. We therefore ask the Court to reverse the judgment below.

Respectfully submitted,

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